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Supreme Court, U.S.
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No. 98-1491

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

GLOBE INTERNATIONAL, INC.,
Petitioner,
v.
KHALID KHAWAR,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the State of California

SUPPLEMENTAL APPENDIX TO THE PETITION FOR WRIT OF CERTIORARI

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IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SEVEN

No. B084899

(Super. Ct. No. WEC139685
Consolidated with SC003094)

KHALID KHAWAR,
Plaintiff and Respondent,

v.

GLOBE INTERNATIONAL, INC.,
Defendant and Appellant,

and

ALI AHMAD aka ALI AHMAND,
Plaintiff and Cross-Appellant,

v.

GLOBE INTERNATIONAL, INC.,
Defendant and Cross-Respondent.

Appeal from a judgment of the Superior Court of Los Angeles County. Richard G. Harris, Judge Presiding. Affirmed.

FACTS AND PROCEEDINGS BELOW

In the April 4, 1989 issue of its tabloid *The Globe,* defendant Globe International, Inc. ("Globe") published an article headlined "*Former CIA agent claims*: IRANIANS KILLED BOBBY KENNEDY FOR THE MAFIA." The article was the subject of the following reference on the front page of the issue: "Iranian secret police killed Bobby Kennedy." The article was written by John Blackburn, a reporter who had worked for Globe as an employee and a free-lance reporter for nearly five years. The article reported on a previously published book entitled *The Senator Must Die: The Murder of Robert F. Kennedy*, written by Robert Morrow and published in November 1988 by Roundtable Publishing. Robert Morrow is a conspiracy theorist who has also written a book about the assassination of John F. Kennedy entitled *Betrayal,* published in 1976. As background for the article, Blackburn allegedly read Morrow's entire book and conducted an in-depth interview of the author.

The theory set forth by Morrow in *The Senator Must Die* is that Robert Kennedy was assassinated by the Iranian Secret Police working in conjunction with the Mafia, and that the true assassin was not Sirhan Sirhan, but a man who called himself Ali Ahmand. The book contained four photographs which appeared beneath the caption, "Photographs of Ali Ahmand." These photos depicted Plaintiff Khalid Iqbal Khawar standing on the podium near Robert Kennedy on the night of the assassination in June of 1968 at the Ambassador Hotel in Los Angeles. Plaintiff Ali Ahmad is in fact the father of respondent Khawar.

In 1968, Khawar, who at the time was a citizen of Pakistan, obtained a position as a free-lance photojournalist for a Pakistani periodical during the presidential elec

tion campaign of 1968. On the night of the assassination Khawar was photographed on the podium near Senator Kennedy, but he never actually entered the pantry area of the hotel where the fatal shots were fired. After the assassination, Khawar was involved in the investigations of the Los Angeles Police Department and the Federal Bureau of Investigation as one of many participants in the campaign event. A few authors have posed questions as to Khawar's activities on June 4, 1968, including Morrow as well as Robert Blair Kaiser in his book *RFK Must Die,* published in 1970. Nevertheless, no official questions have ever been raised concerning Khawar's activities during any phase of his work on the campaign.

The April 1989 article in *The Globe* was accompanied by a photo of Khawar which had previously been published in Morrow's book. Globe added an arrow which pointed to Khawar. Following its publication Khawar received a telephone call from one of his ex-employees, informing him of the story. He received calls regarding the article from places as distant as New Jersey and Bangkok. He and his children received death threats. His house was vandalized, as was his son's car.

On August 31, 1989, Khawar filed suit against Globe, Roundtable and Morrow, alleging that the Globe article and Morrow's book had defamed him. Ahmad filed a defamation suit against the same defendants on November 29, 1989. On September 16, 1991, the two actions were consolidated.

Before trial, both Khawar and Ahmad settled with Roundtable and a Morrow's default was entered. Khawar and Ahmad sought a judgment against Morrow for two million dollars. A jury trial ensued on the claims of Khawar and Ahmad against Globe. However, pursuant to the trial

court's power as specified in Code of Civil Procedure Section 592, on two issues the jury's verdict was to be advisory only: (1) Whether Khawar was a public or a private figure, and (2) whether Globe's article was a "neutral report" concerning Morrow's book. At the end of the plaintiffs' case on March 17, 1994, the trial court granted Globe's motion for a nonsuit with respect to Ahmad on the ground that the Globe article was not "of and concerning" Ahmad.

At the conclusion of the trial, the jury found that: (1) The article was a neutral and accurate report of the statements made by Morrow in his book; (2) Khawar was a private figure; (3) Globe published its article negligently and either knowing that the defamatory statements were false or with reckless disregard of whether the defamatory statements were true or false; and (4) Globe published the article with malice or oppression. The jury assessed damages in favor of Khawar against Globe as follows: $100,000 for harm to Khawar's reputation; $400,000 for emotional distress; and $175,000 in presumed damages. Following a separate punitive damage phase, the jury awarded an additional $500,000 in punitive damages.

The trial judge disagreed with the jury's finding that the article was a neutral and accurate report but allowed the jury's finding that Khawar was a private figure to stand. A judgment in favor of Khawar and against Globe for $1,175,000 as found by the jury was entered on April 15, 1994.[1]

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[1] The trial judge found that the photograph of Khawar that appeared in the Globe constituted the original libel because that photograph (even though it purported to be from the same negative as one in the book) was clear enough to enable Khawar to be identified from it whereas it was impossible to identify Khawar from the much darker and less clear photographs in Morrow's book. Based upon that finding, the trial judge vacated the default of Morrow and

Globe filed a timely notice of appeal from the April 15, 1994 judgment in favor of Khawar. Ahmad filed a notice of appeal from the April 15, 1994 judgment also, but that judgment contained no provisions concerning Ahmad. (While a minute order noting the granting of Globe's motion for directed verdict against Ahmad was created when that motion was granted on March 17, 1994, the impact of the granting of that motion was not embodied in any judgment entered prior to the filing of Ahmad's notice of appeal.) On April 3, 1996, the April 15, 1994 judgment was amended nunc pro tunc as of April 15, 1994 to add: "Plaintiff Ali Ahmad shall have and recover nothing from defendant Globe International, Inc." —thereby curing the defect in Ahmad's notice of appeal.

Globe contends that this Court should reverse the judgment below for the following reasons: (1) Khawar should be classified as a public figure, thereby allowing the Globe article to be privileged under the doctrine of neutral reportage; (2) The trial court exceeded its authority by disregarding the jury's finding of a neutral and accurate report; (3) There was no evidence to support a finding that Globe published its article with malice or reckless disre-

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judgment was ultimately entered in Morrow's favor. Neither Plaintiff has appealed from the judgment insofar as it exculpates Morrow.

Globe urges that the trial judge's finding that the photograph in the Globe article was materially different from its counterpart in the Morrow book could not be used to support the trial judge's finding that the article was not a neutral and accurate report of Morrow's book because the material difference between the two photographs had not been pleaded or argued during the trial. Entirely apart from the fact that there were many other items of evidence that supported a finding that the article was not a neutral and accurate report of the book, the issue of whether the article was a neutral and accurate report is irrelevant on this appeal because of our holding in Points II and III, *infra*, that Khawar was a private figure and that in California there is no neutral reportage privilege applicable to private figures.

gard; (4) Even if Khawar is labeled a private figure, the jury's finding of a neutral and accurate report precludes a finding of negligence; (5) Permitting the so-called scientific testimony of Gavin De Becker constituted reversible error; and (6) The submission of numerous jury instructions left the jury without proper guidance and completely confused. After an independent examination of the entire record, we find no merit in any of these contentions and consequently affirm the judgment as against Globe.

The only contention asserted by Ahmad on appeal is that the trial court's granting of Globe's motion for a nonsuit on the ground that the article was not "of and concerning" Ahmad was improper. Again, following our independent examination of the entire record, we reject Ahmad's contention and affirm the judgment as against Ahmad.

DISCUSSION

I. ONE WHO REPEATS OR REPUBLISHES A DEFAMATORY STATEMENT IS ORDINARILY AS LIABLE THEREFOR AS THE ORIGINAL PUBLISHER.

It is truly hornbook law that "[with an exception not here relevant,] one who repeats or otherwise republishes defamatory matter is subject to liability as if he had originally published it." (Rest. Torts 2d, Section 578.) California has recognized this principle for exactly 100 years:

> "If A. says B. is a thief, and C. publishes the statement that A. said B. was a thief, in a certain sense this would be the truth, but not in the sense that the law means. It would be no defense to C., for it would be but a repetition by him of a slanderous charge. His defense must consist in showing that in fact B. was a thief." (*Gilman v. McClatchy* (1896) 111 Cal. 606, 612. Accord, *e.g., Cianci v. New*

Times Publishing Co. (2d Cir. 1980) 639 F.2d 54, 60-61; and authorities from other jurisdictions collected there.)

There are a number of statutory exceptions to this general principle, but none applies to the fact situation presented by the case at bar. (See, *e.g.*, Civ. Code §§ 43.8, 47, 48.5, 48.7, 48.9.) However, Globe asserts that a privilege created by case law, called the "neutral reportage privilege," immunizes it against liability here. We shall consider the extent (if at all) to which that privilege exists in California in Point III, *infra*, after considering a preliminary question in Point II.

II. THE TRIAL COURT'S FINDING THAT RESPONDENT KHAWAR WAS A PRIVATE FIGURE IS SUPPORTED BY THE EVIDENCE AND THE LAW.

The question of whether a plaintiff is a public or private figure is to be determined by the court, not the jury. (*Stolz v. KSFM 102 FM* (1994) 30 Cal.App.4th 195, 203-204 [35 Cal. Rptr.2d 740].) A trial court's decision on this issue is a mixed question of law and fact. The trial judge must examine the underlying facts and upon that basis conclude, as a matter of law, whether or not a plaintiff is a public figure. When an appellate court is called upon to review the trial court's decision in this regard, the appropriate standard of review is whether, after an independent review of the entire record, substantial evidence supports the trial court's decision. (*Weingarten* v. *Block* (1980) 102 Cal. App.3d 129, 134-35, 142-43 [162 Cal. Rptr. 701], *cert. denied,* 449 U.S. 899, 101 S.Ct 267 (1980).)

An individual may become a public figure in several ways. One way is to be classified as a general public

figure, namely, a person who has achieved such pervasive fame or notoriety that he or she becomes a public figure for all purposes and in all contexts. (*Mosesian* v. *McClatchy Newspapers* (1991) 233 Cal. App.3d 1685, 1689 [285 Cal. Rptr. 430], *cert. denied,* 504 U.S. 912, 112 S.Ct. 1946, 118 L.Ed.2d 551 (1992); *Gertz* v. *Robert Welch, Inc.* (1974) 418 U.S. 323, 351 [41 L.Ed.2d 789, 812, 94 S.Ct. 2997, 3008].) Another way is to become a limited-purpose public figure. These are people who have either voluntarily injected themselves into a particular public controversy, or who have been drawn into such a controversy. The former are termed voluntary limited-purpose public figures; the latter are termed involuntary limited-purpose public figures. These people become public figures regarding the particular issue or controversy with which they are associated. (*Ibid.*)

Globe contends that respondent Khawar is an involuntary limited-purpose public figure because of his proximity to the events which occurred the night of the assassination of Robert Kennedy. Additionally, Globe asserts that Khawar's appearance on a television program after publication of the Globe article supports his classification as a public figure. We hold that the trial judge's decision that Khawar was a private figure is supported by substantial evidence and by the law.

In *Brown* v. *Kelly Broadcasting* (1989) 48 Cal.3d 711 [257 Cal. Rptr. 708, 711 P.2d 406], the California Supreme Court held that a publication or broadcast by a member of the news media to the general public regarding a private person is not privileged under Civil Code section 47, subdivision (c)[2] regardless of whether the communication concerns a matter of public interest. The

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[2] At the time when Brown was decided, subdivision (c) of Section 47 was numbered subdivision 3.

defendant argued that the plaintiff was a public figure and would consequently have to prove malice on the part of the defendant in order to recover for the alleged defamation. In its discussion, the California Supreme Court addressed the boundaries of the limited-purpose public figure classification.[3] It held that a person is not a public figure merely because he or she happens to be involved in a controversy that is newsworthy. (Accord, *Time, Inc.* v. *Firestone* (1976) 424 U.S. 448, 452-55 [47 L.Ed.2d 154, 161-64, 96 S.Ct. 958]). In order to be classified as a limited-purpose public figure, an individual must have undertaken some voluntary act through which he or she seeks to influence the resolution of the public issue involved. Furthermore, when called upon to make a determination of limited-purpose public figure status, courts should look for evidence of affirmative actions by which the individual has thrust himself or herself into the forefront of a particular public controversy. (*Reader's Digest Ass'n* v. *Superior Court* (1984) 37 Cal.3d 244, 254-55 [208 Cal.Rptr. 137, 690 P.2d 610]; *Vegod Corp.* v. *American Broadcasting Companies, Inc.* (1979) 25 Cal.3d 763, 768-69 [160 Cal.Rptr. 97, 603 P.2d 14], *cert. denied,* 449 U.S. 886, 101 S.Ct. 242 (1980).) In the case at bar, the trial court held that Khawar's appearance on the podium in the ballroom did not make him an involuntary public figure within the context of the assassination which actually occurred in the pantry, an area Khawar never entered. This court concurs in that analysis. Khawar's affirmative actions, namely, attendance at

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[3] Although the *Brown* case involved the issue of the applicability of the Civil Code Section 47(3) privilege to a private person rather than the issue of the applicability of the "neutral reportage" doctrine to a private person, the policy factors involved in both issues are substantially the same; and we therefore find cases involving the Section 47(3) privilege highly persuasive on the issue before us.

the Kennedy campaign rally and appearance on the podium near Senator Kennedy, do not rise to the level of action by which the purported public figure *thrust himself into the forefront of a public controversy*. Khawar undertook no voluntary act which sought to *influence the resolution of a public issue*.

The United States Supreme Court stated in *Gertz* v. *Robert Welch, Inc., supra,* 418 U.S. at 352, that a court must focus on "the nature and extent of an individual's participation in the particular controversy giving rise to the defamation." As discussed within the context of the *Brown* holding, Khawar's action of appearing on the podium at the rally is not sufficient in nature and extent to suggest that Khawar undertook voluntary action which elevated his status to the level of a public figure. The United States Supreme Court also held in *Wolston* v. *Reader's Digest Ass'n., Inc.,* (1979) 443 U.S. 157, 167, 99 S.Ct. at 2675, 2707, 61 L.Ed.2d at 460, that "[a] private individual is not automatically transformed into a public figure just by becoming involved in or associated with a matter that attracts public attention." As such, Khawar's involvement as one of many participants in the events leading up to the assassination does not automatically classify him as a public figure. Additionally, as Justice Blackmun stated in his concurring opinion in *Wolston*, the passage of time often will be relevant in deciding whether a person possesses the characteristics of a public figure. (443 U.S. at 170. See also *Briscoe* v. *Reader's Digest Ass'n, Inc.* (1971) 4 Cal.3d 529, 537-540.) The trial court followed this line of reasoning when it stated that the lapse of twenty years since the Robert Kennedy assassination was sufficient to reduce any arguable public figure status of Khawar to that of a private figure.

Khawar did give an interview in 1989 to television station KERO in Bakersfield in order to rebut the charges

made by Globe.[4] Khawar was privileged to conduct this interview in order to protect his own interests without sacrificing his status as a private figure. The Fourth Circuit held in *Foretich* v. *Capital Cities/ABC, Inc.* (4th Cir. 1994) 37 F.3d 1541, 1558, that "A person who has been publicly accused of committing an act of serious sexual misconduct that would be punishable by imprisonment cannot be deemed a 'limited-purpose public figure' merely because he or she makes reasonable public replies to those accusations." The court reasoned that it did not want to "attribute public figure status to otherwise private persons merely because they had responded to such accusations in a reasonable attempt to vindicate their reputations." Having been accused of assassinating Robert Kennedy in the Globe article, a crime which would certainly be punishable by imprisonment and generate public outrage, Khawar's interview with the local television station in Bakersfield was an attempt to vindicate his reputation. His status as a private figure was not raised to the level of a limited-purpose public figure merely because of his involvement with the media in this one interview. (See also *Time, Inc.* v. *Firestone, supra,* 424 U.S. at 455 fn. 3.)

In *Denney* v. *Lawrence,* (1994) 22 Cal.App.4th 927 [27 Cal.Rptr.2d 556], the Court of Appeal held that the plaintiff was a limited-purpose public figure because he had voluntarily involved himself in the controversy surrounding his brother's arrest, conviction, and sentencing. Plaintiff had given press interviews which promoted his

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4 Globe asserts, without citation to the record before us, that Khawar made other post-publication appearances and gave other post-publication interviews. We have found nothing in the record demonstrating that evidence of such other activities on the part of Khawar was presented to the trial court, and so we ignore those assertions. (See California Rules of Court, Rule 13(a) ["The statement of any matter in the record shall be supported by appropriate reference to the record."].)

version of the case and had attempted to influence public opinion as to the circumstances surrounding his brother's case. The court's holding in *Denney* is instructive in an analysis of the action taken by Khawar. Khawar merely rebutted the charges made against him in the Globe article in a lone interview on a Bakersfield television station. He did not attempt to influence public debate or become involved in the controversy surrounding the assassination of Robert Kennedy. His only involvement was to rebut the actual libel. Because he did not involve himself in the public debate of the underlying issue—the assassination of Robert Kennedy—he is properly distinguished from the plaintiff in *Denney* whose actions elevated his status to a limited-purpose public figure. Under the analysis in *Denney*, Khawar's actions do not raise him above the status of a private figure.

In sum, the evidence and the law justify the trial judge's finding that Respondent Khawar was a private figure, not a limited-purpose public figure. He undertook no voluntary action which brought him into the center of public controversy, and he took no part in any attempt to shape opinion on the resolution of a public issue.

III. CALIFORNIA HAS NOT ADOPTED THE NEUTRAL REPORTAGE PRIVILEGE WITH RESPECT TO PRIVATE FIGURES

In 1977 a privilege, which has become known as the "neutral reportage privilege," was created by the Second Circuit in *Edwards* v. *National Audubon Society, Inc.* (2d Cir. 1977) 556 F.2d 113, *cert. denied,* 434 U.S. 1002. That privilege protects against an action for defamation the accurate and disinterested reporting of charges by others that are themselves newsworthy. In other words, it protects the accurate and disinterested reporting of

charges made by others that are of public interest because they were uttered and not necessarily because of what they say. In order to qualify for the protection afforded by this privilege, the existence of four essential elements must be demonstrated: (1) the charges must be newsworthy charges that create or are associated with a public controversy; (2) the charges must be made by a responsible and prominent souurce; [5] (3) the charges must be reported neutrally and accurately; and (4) the charges must be about a *public official or public figure.*

The "neutral reportage privilege" has been adopted in some jurisdictions and rejected in others.[6] We are aware

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5 This requirement may have been substantially diluted over the years since *Edwards* was decided. See *Barry v. Time, Inc.* (N.D. Cal. 1984) 584 F. Supp. 1110, 1125-1127.

6 Adopting jurisdictions include Ohio (*April v. Reflector-Herald, Inc.* (1988) 46 Ohio App.3d 95, 546 N.E.2d 466). (Appellate decisions in official reports in the Eighth Circuit [*Price v. Viking Penguin, Inc.* (8th Cir. 1989) 881 F.2d 1426, *cert. denied*, 493 U.S. 1036 (1990)] and Florida [*Huszar v. Gross* (Fla. Ct. App. 1985) 468 So.2d 512] adopt a neutral reporting privilege but are referring to one protecting neutral reporting of official proceedings rather than of charges made by a private figure not before a public body and not to a public official.)

Rejecting jurisdictions include the Third Circuit (*Dickey v. CBS, Inc.* (3d Cir. 1978) 583 F.2d 1221; but see *Medico v. Time, Inc.* (3d Cir. 1981) 643 F.2d 134, 145, *cert. denied*, 454 U.S. 836, 102 S.Ct. 139, 70 L. Ed.2d 116 (1981)); New York (*Hogan v. Herald Co.* (1982) 84 App. Div.2d 470, 446 N.Y.S.2d 836, *aff'd*, 58 N.Y.2d 630, 458 N.Y.S.2d 538, 444 N.E.2d 1002); Kentucky (*McCall v. Courier-Journal & Louisville Times Co.* (Ky. 1991) 623 S.W.2d 882, *cert. denied*, 456 U.S. 975, 102 S.Ct. 2239, 72 L.Ed.2d 849 (1982); and South Dakota (*Janklow v. Viking Press* (S.D. 1985) 378 N.W.2d 875, 881.)

Intermediate Illinois appellate court decisions have split on whether the privilege applies in that state. (*Krauss v. Champaign News Gazette, Inc.* (1978) 59 Ill. App.3d 745, 375 N.E.2d 1362 [privilege adopted]; *Newell v. Field Enterprises, Inc.* (1980) 91 Ill. App.3d 735, 47 Ill. Dec. 429, 415 N.E.2d 434 [privilege rejected];

of no reported state court in California deciding whether the neutral reportage privilege exists in the state.[7] For a reason we are about to discuss, we will not reach the question of whether the neutral reportage privilege exists in California.

Tunney v. American Broadcasting Co. (1982) 109 Ill. App.3d 769, 777-778, 441 N.E.2d 86, 92 (1982) [privilege rejected].) The Illinois Supreme Court has not resolved the conflict. (See *Catalano v. Pechous* (1980) 83 Ill.2d 146, 170, 419 N.E.2d 350, 362, *cert. denied*, 451 U.S. 911 (1981).)

Neither the United States Supreme Court nor the Ninth Circuit has adopted or rejected the privilege.

The checkered history of the neutral reportage privilege was traced, and its then current status was discussed, by the prevailing counsel of record in *Edwards*, in Abrams, *The First Amendment in the Second Circuit: Reflections on Edwards v. National Audubon Society, Inc., the Past and the Future*, 65 St. John's L. Rev. 731, 737 (1991) (The privilege "was novel when decided in 1977 and remains unresolved today.")

[7] Globe claims that the neutral reportage privilege has been adopted in three reported California state court cases: *Weingarten v. Block, supra*, 102 Cal. App.3d 129, 148 [162 Cal. Rptr. 701], *cert. denied*, 449 U.S. 899, 101 S. Ct. 267 (1980); *Grillo v. Smith* (1983) 144 Cal. App.3d 868, 872 [193 Cal. Rptr. 414]; and *Stockton Newspapers v. Superior Court* (1988) 206 Cal. App.3d 966, 981-982 [254 Cal. Rptr. 389]. *Amici curiae* make no such claim.

While each of these three cases cites *Edwards*, our examination of them leads us to conclude that they do not support the proposition that California has adopted the neutral reportage privilege. *Weingarten* and *Grillo* merely quote brief passages from *Edwards* as authority for the general proposition that the press may report charges concerning a public figure without automatically assuming responsibility for them; neither case mentions any neutral reportage privilege or sets forth the elements therof. *Stockton Newspapers* involved only the Civil Code Section 47(c) privilege and cited *Edwards* in a footnote for the proposition that "[i]t has been suggested that there is or should be a somewhat analogous doctrine within the federal constitutional privilege"; assuming that the doctrine referred to was the neutral reportage privilege, *Stockton Newspapers* did not adopt that doctrine or in any way indicate that it had been adopted in California.

Globe contends that even if Khawar is classified as a private figure, many courts have held that the neutral reportage privilege set forth in *Edwards* encompasses the right to report an allegation concerning a private figure. As authority for this contention Globe cites *April* v. *Reflector-Herald, Inc.*, (1988) 46 Ohio App. 3d 95, 98, [546 N.E.2d 466]. While this case may be persuasive within its jurisdiction, it is not binding upon this court. An examination of *California* precedent leads us to conclude that in this state there is no neutral reportage privilege applicable to situations involving private figures.

To begin with, there are two reported United States District Court cases in point: *Barry* v. *Time, Inc.* (N.D. Cal. 1984) 584 F.Supp. 1110, 1127, stated that "[t]he neutral reportage privilege . . . is not without limitations. It cannot be used as an absolute privilege to republish defamatory statements about purely private persons not already caught up in a public controversy. The privilege applies whether the defamed person is a *public figure,* whether general or limited, who is involved in an existing controversy." (Emphasis added.)[8] Next, in *Crane* v. *Arizona Republic* (C.D. Cal. 1989) 729 F. Supp. 698, 710-711, the District Judge noted the existence of the neutral reportage doctrine and its application in the *Barry* case to a public figure. However, the District Judge then stated:

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[8] The definitiveness of *Barry*'s holding on the issue before us is uncertain. Shortly after making the above-quoted statement in no uncertain terms, in a footnote the *Barry* court indicated that "[s]ince this court finds that Barry is a public figure, it is unnecessary to resolve this difficult question [whether the neutral reporting privilege applies to private figures] at the present time." (584 F. Supp. 1127 fn. 20.)

In reliance on the decision in *Barry, Ward v. News Group International Ltd.* (C.D. Cal. 1990) 733 F. Supp. 83, held the doctrine of neutral reportage applicable to a public figure.

> "The Court of Appeals for the Ninth Circuit has neither adopted nor rejected this doctrine. Only the Court of Appeals for the Second Circuit in Edwards v. National Audubon Society, 556 F.2d 113, 1125 (2d Cir. 1977), and a handful of district courts have adopted the doctrine. Many courts have rejected the doctrine. See Note, The Developing Privilege of Neutral Reportage, 69 Va.L.Rev. 853, 863-65 (1983) (collecting cases). This court need not adopt or reject this doctrine in rendering its decision . . . as the facts of this case [including the fact that one of the plaintiffs was not a public figure] render the doctrine inapplicable." (729 F.Supp. at 710.) (Accord, *e.g., Dixson v. Newsweek, Inc.* (10th Cir. 1977) 562 F.2d 626, 631.)[9]

In the face of these persuasive but non-binding District Court cases, Globe and *amici curiae* suggest that policy reasons exist for extending the neutral reportage privilege to private individuals. These policy considerations are best discussed in light of the California Supreme Court's decision in *Brown* v. *Kelly Broadcasting Co., supra*, 48 Cal.3d 711. The court in *Brown* held that a publication or broadcast by a member of the news media to the general public regarding a private person is not privileged under Civil Code section 47, subdivision (c)—the so-called "public interest privilege."[10] The court so held in the face of the defendant's argument that the communication should

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[9] The Ninth Circuit's opinion in the *Crane* case expressly declined to review the District Court's determination concerning the neutral reportage doctrine because neither party contested that determination on appeal. (*Crane v. Arizona Republic* (9th Cir. 1992) 972 F.2d 1511, 1525.)

[10] Again, we find cases involving Section 47(c) highly persuasive on the issue before us. See footnote 3, *supra*.

be privileged as a matter of public interest. The policy reasons asserted by Globe and *amici* in this case as well as those asserted by the defendant in *Brown* center around one theme, namely, an assertion that the privilege in question is a necessary aspect of the First Amendment's protection for news reporting. The *Brown* court examined the balance between the First Amendment's protection of news reporting and the protection of a private individual's reputation. Quoting a Florida District Court of Appeals case, this balance was discussed as follows:

> "The defamation action, properly limited, plays an important role in a free society as it represents the individual's sole remedy against the occasional excesses of the print and electronic media which often have vast resources to inflict untoward damage upon an individual. Surely, a decent, open society cannot, in the name of press and speech freedom, so thoroughly undermine this remedy as to render it useless to those people who have been damaged by a defamatory falsehood negligently uttered in the mass media and have not in any way sought the public limelight. . . . It therefore seems neither sensible nor fair to push the parameters of free press and free speech to such an extent . . . that we needlessly plow under other important individual rights." (48 Cal.3d at 743, quoting *Miami Herald Pub. Co. v. Ane* (Fla. App.1982) 423 So.2d 376, 387.)

In other words, the *Brown* court's examination of these competing interests yielded the result that news media must not be privileged to report in a way which may unreasonably undermine individual rights because "a reasonable degree of protection for a private individual's reputation is essential to our system of ordered liberty." (*Brown v. Kelly Broadcasting, supra,* 48 Cal.3d at 743).

This court holds that in California there is no neutral reportage privilege extending to reports regarding private figures. We do not reach the question of whether the privilege exists at all in California because even if it does exist, it does not apply to Khawar—a private figure.

Accordingly, because the privilege, even if it exists in California, would be inapplicable to the case at bar, any further discussion of whether the elements of the privilege are satisfied with regard to the Globe article is irrelevant. In particular, the court's finding that the neutral reportage privilege is inapplicable in this case forecloses another issue raised by Globe on appeal: Appellant contends that the trial court exceeded its authority by disregarding the jury's finding that the Globe article was a neutral and accurate report. We find it unnecessary to reach this issue; whether the Globe article was a neutral and accurate report of the charges in Morrow's book is irrelevant in light of our holding that in California any neutral reportage privilege does not apply to private figures such as Khawar.

IV. THERE WAS SUBSTANTIAL EVIDENCE TO SUPPORT THE JURY'S FINDINGS THAT GLOBE PUBLISHED ITS ARTICLE WITH MALICE AND EITHER KNOWING THE DEFAMATORY STATEMENTS WERE FALSE OR WITH RECKLESS DISREGARD OF WHETHER THEY WERE TRUE OR FALSE.

If Khawar were a public figure, the judgment in his favor could not stand unless the record supported the jury's finding that Globe acted with malice and either knowing the defamatory statements were false or with reckless disregard of whether they were true or false. (*New York Times v. Sullivan* (1964) 376 U.S. 254.) Because Khawar was a private figure, he was not required to

prove malice or reckless disregard in order to recover compensatory damages. (*E.g., Franklin v. Benevolent and Protective Order of Elks, Lodge No. 1108* (1979) 97 Cal. App.3d 915.) However, even as a private figure, the punitive damage award in his favor cannot stand unless the record supported the jury's finding that Globe acted with malice or oppression. Actual malice (and reckless disregard, for that matter) are concepts which are difficult to define with precision. The meanings assigned to these terms cannot readily be captured in one infallible definition. (*St. Amant v. Thompson* (1968) 390 U.S. 727, 730 [20 L.Ed.2d 262, 88 S.Ct. 1323]). Rather, only through a case-by-case analysis can a court give content to these otherwise elusive standards. (*Harte-Hanks Communications v. Connaughton* (1989) 491 U.S. 657, 686 [105 L.Ed.2d 562, 109 S.Ct. 2678]).

In its consideration of these standards, the Court of Appeal in *Antonovich v. Superior Court* (1991) 234 Cal. App.3d 1041, 1048 [285 Cal.Rptr.863], stated: "There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice." The court goes on to assert that a failure to investigate will not on its own support a finding of actual malice. However, it concludes that "the purposeful avoidance of the truth is in a different category. Inaction, i.e., failure to investigate, which was a product of a deliberate decision not to acquire knowledge of facts that might confirm the probable falsity of charges will support a finding of actual malice." (*Ibid.*) In short, purposeful avoidance of the truth will support the finding that the defendant entertained serious doubts as to the truth of its publication, and this finding will give rise to the conclusion

that there was reckless disregard for truth or falsity and actual malice.

There are several facts in this case which support the finding that Globe published its article pursuant to a deliberate decision not to acquire knowledge of facts that might reveal the falsity of the charges. We start with the fact that the article is not merely false but glaringly false —it makes assertions that on the surface seem extraordinarily improbable—a fact that certainly is circumstantial evidence that Globe's representatives had a very high degree of skepticism concerning the truthfulness of the charges. Next, we have the failure by the article's author, John Blackburn, to contact the person called "Ahmand" in Morrow's book. Blackburn testified that he believed he had checked with the Los Angeles directory assistance and was told there was no such person as Ahmad listed. However, his notes reflect no such attempt. Ahmand is in fact listed in the Bakersfield telephone directory and there is a public database available which contains directory assistance listings for the entire country. Furthermore, for minimal cost, a private investigator could have been retained to locate Ahmad. Plaintiff's expert Gavin De Becker was able to locate Khawar by referencing the index of Morrow's book which states that Ahmand is also referred to as Khalid Iqbal. A single call to directory assistance in Los Angeles provided him with the telephone number of an Iqbal relative who informed him that Khalid Iqbal lived in Bakersfield and is also referred to as Khalid Khawar. A single call to the Bakersfield directory assistance provided Khawar's number. Furthermore, the spelling of Ahmad's name as Ahmand still provided De Becker with Ahmad's telephone number.

There are also contradictions in the record regarding Blackburn's efforts to contact other key sources regarding

the assassination of June 4, 1968. When asked whether he had interviewed anyone else regarding the story, specifically three obvious key people connected to the Kennedy campaign or at the Ambassador Hotel on the night of the assassination, Blackburn testified that he was not sure. (1) Rosey Grier, a celebrity and Kennedy security official who was present at the hotel on the night of the assassination, testified he was certain he was not contacted by anyone from Globe. (2) Frank Mankiewicz, press secretary to Robert Kennedy and witness to the actual murder, stated that neither Blackburn nor anyone ~~else~~ at Globe had contacted him in connection with the story. Finally, (3) Colonel L. Fletcher Prouty, Jr., an armed forces officer under the Kennedy administration whose autobiography entitled *The Secret Team* explored the assassination of John F. Kennedy, testified that he did not authorize the foreword attributed to him in Morrow's book and that no one at Globe had contacted him in any capacity.

Blackburn's failure to recall whether he had ever contacted these people in the face of their direct testimony that he had not must be considered in light of the instructions received by the jury, specifically BAJI No. 2.22. Under this instruction, the jury is permitted to reject the entire testimony of a witness who willfully has testified falsely on a material point. (*Nelson* v. *Black* (1954) 43 Cal.2d 612, 613 [275 P.2d 473]). In the case at bar, whether Blackburn contacted obvious sources who would certainly have confirmed the falsity of the story is a material point. The tentative nature of Blackburn's testimony on that point would have justified the jury under BAJI No. 2.22 in rejecting his entire testimony concerning the efforts of Globe to properly investigate the story.

The testimony of three Globe editors who were associated with the story further demonstrates a series of

deliberate decisions not to acquire knowledge of facts which would have confirmed the probable falsity of the charges. Editor Ken Harrell, who approved Blackburn's story proposal, testified that Globe lacked any knowledge or evidence that would lend credibility to Morrow's charges. In light of its pretrial defense that the story was really a book review, Globe claimed that the truth or falsity of the charges was irrelevant. However, Blackburn contradicted this characterization, and Globe eventually stipulated that the article was in fact not a book review but a news story. Editor Rod Gibson, who edited Blackburn's story, testified that Globe did not know whether any of the statements in Morrow's book were true, other than facts on record such as Sirhan Sirhan's arrest for the murder. Finally, managing editor Robert Taylor stated that Globe made no attempt to contact *any* of the twenty-three hundred people who were present on the night of the assassination. He further testified that there was *no need to investigate this kind of story,* yet he had no recollection of a deadline for publication.[11] These statements conflicted with the testimony of John Blackburn that he had in fact made an attempt to investigate Morrow's charges.

In sum, the foregoing evidence strongly suggests that Globe purposefully avoided the truth. Therefore, it was permissible for the jury to conclude that the article was published in the face of serious doubts regarding its truth and credibility. Measured by the standards set forth in *Antonovich, supra,* the foregoing evidence supports the jury's finding that Globe published its article with malice and reckless disregard.

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[11] The need for constitutional protection is much less where more considered editorial judgments are possible than when items are reports of "hot news"——items of possible *immediate* public concern or interest. (*Briscoe v. Readers Digest Assn., Inc., supra,* 4 Cal.3d 529, 535.)

V. THERE WAS SUBSTANTIAL EVIDENCE TO SUPPORT THE JURY'S FINDING THAT GLOBE WAS NEGLIGENT IN THE PUBLICATION OF ITS ARTICLE.

Globe contends that the jury's finding of a neutral and accurate report precludes a finding of negligence. It asserts that the proper question under a negligence standard is whether Globe was indifferent or negligent with respect to the accurate reporting of the charges in Morrow's book. Based upon the jury's finding that the article was a neutral and accurate report, Globe argues that it was improper for the jury to find that Globe was negligent.

In asserting this argument, Globe confuses two separate duties. One is a publisher's duty to neutrally and accurately report the information contained in a source of an article, in this case, Morrow's book. Separate is a publisher's general duty to report the truth. It is the second duty on which the jury presumably focused in determining that Globe acted negligently in the dissemination of the facts surrounding the content of the article. It is this duty to which we now devote attention.

Several experts testified at trial that Globe's conduct fell below the acceptable standard of care for journalism. Two sources were presented at trial as reflective of this standard of care. The first was the Society of Professional Journalists' Code of Ethics. Article IV of the Code deals with accuracy and objectivity, stating: "Truth is our ultimate goal. . . . Photographs and telecasts should give an accurate picture of an event and not highlight an incident out of context." Article V on fair play specifically addresses the protection of individual reputations, stating: "The news media should not communicate unofficial charges affecting reputation or moral character without giving the accused a chance to reply." This

standard is also reflected in the second source, Article VI of the American Society of Newspaper Editors' Statement of Principles: "Journalists should respect the rights of people involved in the news, observe the common standards of decency, and stand accountable to the public for the fairness and accuracy of their news reports. . . . Persons publicly accused should be given the earliest opportunity to respond."

In applying these standards to Globe's conduct in this case, we are assisted by the evidence reviewed in Point IV, *supra,* addressing Globe's malice and reckless disregard for the truth in reporting this story. The substantial evidence that Globe failed to contact Ahmad or any other key sources as well as its admitted indifference to the truth or falsity of the story strongly supports the jury's finding that Globe was negligent in failing to learn whether the charges were in fact false before publishing its article.

VI. ANY ERROR IN RECEIVING TESTIMONY FROM DE BECKER WAS EITHER NOT TIMELY ASSERTED BEFORE THE TRIAL COURT OR INVITED, AND SUCH ERROR CANNOT SUPPORT A REVERSAL.

Globe challenges the trial court's decision to allow Gavin De Becker to testify. De Becker conducts a business of providing advice and services designed to protect its clients against terrorists, assassins and others seeking to inflict bodily injury or harass. He was called by Khawar as an expert and testified as to the likelihood that Khawar was placed at risk of bodily harm by the Globe article. Globe contends that the trial court erred in failing to apply a *Kelly/Frye* standard to the testimony of De Becker. That standard requires that before evidence of a new scientific technique is admissible, the general ac-

ceptance of the new technique in the relevant scientific community must be established. (*People* v. *Kelly* (1976) 17 Cal.3d 24 [130 Cal.Rptr. 144, 549 P.2d 1240]; *Frye* v. *United States* (D.C. Cir. 1923) 293 F. 1013.)

With one exception, the testimony of De Becker was not of the sort to be measured by *Kelly/Frye*. With that one exception. De Becker merely expressed his opinion, based upon his familiarity with terrorist and other criminal activity involving bodily harm or the risk of bodily harm and based upon his years of experience in evaluating risk of bodily harm in the course of his business activities. The *Kelly/Frye* standard applies to new scientific techniques and tests and does not apply to expressions of expert opinion that are not based upon such a technique or test. (*E.g., People* v. *Mendibles* (1988) 199 Cal.App. 3d 1277, 1294-1295 [245 Cal.Rptr. 533]; *People* v. *Cegers* (1992) 7 Cal.App.4th 988, 997-999 [9 Cal.Rptr. 297]; *People* v. *Stoll* (1989) 49 Cal.3d 1136, 1155-1157 [265 Cal.Rptr. 111, 783 P.2d 698].)

However, in a hearing held outside of the presence of the jury pursuant to Evidence Code section 402, De Becker testified that his firm had developed and used a computer program that enabled its representatives to predict a range of probability that a given set of facts will result in an attack on a person. According to De Becker's 402 hearing testimony, the data base for that computer program is comprised of facts from actual past cases. The input of those facts obviously involved a subjective weighting of them. Whether the weighting was appropriate is a subject that obviously can be open to disagreement among experts. The computer result generated through the use of the computer program is precisely the novel sort of test result that can be testified to in the presence of the trier of fact only if the requirements of the *Kelly/*

Frye rule have been met. When stating opinions based upon the use of self-prepared computer programs, a witness obviously is speaking as a "scientist" for purpose of the *Kelly/Frye* rule. The showing before the trial court was insufficient under *Kelly/Frye*. There was no evidence whatsoever that the computer program or the weighting of factors inherent in it were generally accepted as accurate and reliable by the scientific community of experts in the science of risk evaluation.

Nevertheless, for two reasons Globe's challenge of the judgment below on *Kelly/Frye* grounds is not persuasive: (1) There was almost no testimony by De Becker *in the presence of the jury* concerning the computer results; (2) What testimony the jury did hear concerning the computer results was either (a) received without objection or motion to strike on the part of Globe or (b) elicited by questioning by Globe's own counsel.

In the presence of the jury and over objection by Globe's counsel, De Becker was asked how he would advise and assess the risk to a client in Khawar's position. Before he began his answer, the question was modified by the following incomprehensible addition, to which no objection was asserted:

> "And including that if you would, Mr. De Becker, the basis, based on your analysis and techniques for whether that person would have reasonable basis for their fears about the security for themselves and their family."

What followed was a lengthy enumeration and description by De Becker of various factors he would take into account in evaluating the risk to such a person, without any mention of a computer program.

Then the following question, also somewhat incomprehensible, was asked *and no objection to it was asserted*:

> "Let's talk about the criteria you use in this Mosaic software program that's used to advise the U.S. Supreme Court Justices and the senators and the congressmen and people like that. Are these criteria the criteria that you factor into your threat assessment analysis and the software that you have provided and the government has contracted for various agencies?"

De Becker's answer was "yes."

The next question that De Becker responded to was the following, again largely incomprehensible and *again without objection*:

> "Mr. De Becker, can you briefly identify, if you can —you can use the writing tablet there—the criteria that you focused on or felt particularly applicable to this case or criteria that you would normally evaluate in risk assessment for vulnerable people?"

De Becker then began to enumerate and describe various criteria he used. At one point, in describing a criteria he called "experience" dealing with what had happened in similar situations in the past, De Becker stated: "In this case I have extensive experience in cases with similar outcomes." Khawar's attorney then asked:

> "Why don"t you stop there for a second. How many cases has Gavin De Becker, Incorporated [De Becker's firm] handled in terms of risk and safety assessments, approximately?

De Becker replied: "We've evaluated about 15,800 cases." Khawar's attorney then asked the following question, *to which no objection was asserted*: "The data from that is

input on your computer assessment?" De Becker's response was as follows:

> "It is. It is. And what happens is that with each of these that I'm describing now, when you measure these factors the computer compares it to thousands of cases. And in those where the outcome is known, the computer comes back and says that this, that you've written here is most similar to those who attacked or this, that you've written here is most similar to those that didn't attack."

No motion to strike this response was made. De Becker then continued with a long narrative in which he identified and described various other factors. In the midst of that narrative, De Becker stated:

> "Now, specifically in the case of threats that he [the person identified in the Globe article as the murderer of Robert Kennedy] had, we apply this Mosaic [the computer program] model. Now, Mosaic would keep us here for a long time, so I'm not going to go into all the—I'm not going to write down the factors. . . ."

Except for this interjection, *to which no motion to strike was directed,* the next time the computer program was mentioned by De Becker was at the end of his narrative, when the following colloquy occurred:

> *De Becker:* "So now to go back to the very beginning of this long answer when you asked what would we evaluate. We would evaluate the emotional investment, and I see a lot of it. And even in the absence of these threats there's the obvious emotional investment connected to this beloved public figure. Then we would evaluate his accessibility and locateability, and we've done that. We would evaluate these communications, which—I mean, it's mathematical.

But—I'll just tell you that the rating they got is called R-2-High, which is right below the highest category you could get."

Counsel for Khawar: "Well, let me just clarify something."

De Becker: "Surely."

Counsel for Khawar: "This is a ranking for your computer program. This is not any sort of percentage you're going to predict with by a percentage basis that something's going to happpen; is it?"

De Becker: "No. It's not a percentage basis. What it indicates is that this case is most similar to a class of cases that did pursue—encounters. If it was the next rating, the higher rating, then it would mean that this case is most similar to a class of cases that pursued encounters and acted out in a way that is violent, and it's right below that level. And I can see why. There are several factors we just don't know about the people. I mean, if I knew that they just purchased a gun, that would obviously increase the—increase the rating."

No objection was made to any question posed during this colloquy, nor was any of De Becker's testimony during this colloquy met by a motion to strike.[12]

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[12] When De Becker seemed about to continue on with his narrative, Globe's attorney objected on, in substance, the ground that there was no question pending. The trial judge, apparently not hearing the objection or not comprehending it because of its informal phraseology, then asked "[d]id you make an objection?" Globe's attorney replied: "Your Honor, I've objected to the entirety of this witness's testimony." The trial judge then stated: "I understand. I'm making my own objection at this time that we need a question."

In one sense it is true that Globe had objected to the entirety of De Becker's testimony: in the sense that Globe asserted that De

Because there was neither objection or motion to strike asserted by Globe concerning the aforementioned testimony of De Becker, any error in receiving that testimony was waived.[13] (Evid. C. § 353(a); *People* v. *Gates* (1987) 43 Cal.3d 1168, 1185 [240 Cal.Rptr. 666, 743 P.2d 301], *cert. denied*, 486 U.S. 1027, 108 S.Ct. 2005 (1988).)

The only other testimony of De Becker conceivably relevant to the present inquiry occurred under cross-examination by Globe's attorney. Again, Globe made no motion to strike such testimony. Any error in receiving that testimony obviously was invited. (*Zarafontis* v. *Yellow Cab Co.* (1932) 127 Cal. App. 607, 609.)

Accordingly, any error in receiving testimony from De Becker was either not timely asserted before the trial court or invited, and such error cannot support a reversal.

Becker was not qualified to even take the witness stand. That objection on Globe's part was properly overruled. However, in another sense—the one critical to evaluating the statement in question in the context now under discussion, it is not true that Globe had objected to the entirety of De Becker's testimony. Once the Court had rejected Globe's effort to keep De Becker off the witness stand entirely, Globe only asserted selected objections to De Becker's testimony, and none to the passages hereinabove quoted. Under these circumstances, to the extent that the trial judge's "I understand" response can be construed as confirming anything, at most it confirmed the understanding of the trial judge that Globe objected to De Becker even taking the witness stand.

[13] Counsel for Globe neither sought nor obtained the agreement of the trial judge that his objections to De Becker's competence would be deemed continuing objections. Compare *People* v. *Jennings* (1988) 46 Cal.3d 963, 975 fn. 3, *cert. denied*, 489 U.S. 1091, 109 S.Ct. 1559 (1989) (stipulation that trial court's ruling on *in limine* motion to exclude evidence would be binding deemed continuing objection, preserving issue of admissibility of the evidence for appeal).

VII. GLOBE'S CONTENTION THAT THE JURY INSTRUCTIONS WERE INCOHERENT AND INCONSISTENT IS WITHOUT MERIT.

Globe's Opening Brief assigns error as follows:

> ". . . [T]he trial court charged the jury with a melange of inconsistent and conflicting instructions covering virtually every issue ever raised in a defamation case, regardless of its application to the particular case at hand. [Citation to the passage in the Reporter's Transcript in which all of the jury instructions given in the trial are transcribed, other than the instructions given during the second phase in which the amount of punitive damages was fixed.] However, the trial court's charge to the jury gave it no advice or direction as to how these inconsistent and often incoherent instructions were to be applied, interpreted or reconciled."

After leveling this nonspecific broadside at the jury instructions given during phase one of the trial, Globe favors us with only a few particulars for review.

Globe complains that while the jury was given instructions on negligence, recklessness and malice, it was not told how these theories of liability interrelated. As Globe's Opening Brief puts it, "[t]he combination of the numerous inconsistent instructions make it impossible to determine the basis for any of the jury's findings." This contention is entirely without merit. All three theories of liability were defined separately and accurately for the jury. Any failure to explain how the three theories interrelated or otherwise to link the three is irrelevant in that the jury was not asked to render a general verdict or even a general verdict on the subject of liability. Instead, the jury was submitted a special verdict form calling for it to determine separately the existence or non-existence of each one of

these three bases for liability. The task of determining how these three bases for liability interrelated was left for the trial judge to perform.

Globe contends that the jury's findings that Globe acted negligently is inconsistent with the jury's finding that Globe was guilty of intentional misconduct and reckless disregard for the truth. We find nothing inconsistent with those findings. The evidence received at trial is sufficient to support a simultaneous finding that Globe intended to engage in misconduct (see Point IV, *supra*) and that this misconduct on the part of Globe was the doing of something which a reasonably prudent person would not do or the failure to do something which a reasonably prudent person would do (see Point V, *supra*) and that it was carried out with reckless disregard for the truth (see Point IV, *supra*).

Finally, Globe contends that "the court gave the jury two confusing, incomplete, and contradictory instructions regarding the issue of whether Khawar is a public figure for the purposes of this case." In view of our determination that the public figure issue was one for the trial judge to decide, not the jury (see Point II, *supra*), any error in instructing the jury concerning this issue is irrelevant.

The foregoing conclusions on our part make it unnecessary for us to evaluate Khawar's contention that any error in instructing the jury was invited by Globe.

VIII. THE TRIAL COURT WAS CORRECT IN ITS DETERMINATION THAT THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT THE SUBMISSION OF AHMAD'S CASE TO THE JURY—INSUFFICIENT EVIDENCE TO SHOW THAT THE GLOBE ARTICLE WAS "OF AND CONCERNING" AHMAD.

The First Amendment dictates that in order to recover in a defamation action, a plaintiff must demonstrate that the alleged defamatory publication specifically refers to, or is "of and concerning," the plainiff. (*New York Times Co.* v. *Sullivan, supra*, 376 U.S. 254, 288-392 [11 L.Ed. 2d 686, 84 S.Ct. 710]; *Rosenblatt* v. *Baer* (1966) 383 U.S. 75, 83 (86 S.Ct. 669, 674). In *Blatty* v. *New York Times Co.*, (1986) 42 Cal.3d 1033, 1042 [232 Cal.Rptr. 542, 728 P.2d 1177], *cert. denied*, 485 U.S. 934, 108 S.Ct. 1107 (1988), the California Supreme Court recognized the constitutional foundation of the requirement that a defamatory publication be of and concerning a plaintiff. In discussing the dangers of defamation law without such a requirement, the court stated: "The 'of and concerning' or specific reference requirement limits the right of action for injurious falsehood, granting it to those who are the direct object of criticism and denying it to those who merely complain of nonspecific statements that they believe cause them some hurt. To allow a plaintiff who is not identified, either expressly or by clear implication, to institute such an action poses an unjustifiable threat to society." (42 Cal.3d at 1044.)

In order to prevail under this standard, Ahmad must show that the Globe article either expressly mentions him or refers to him by reasonable implication. In short, the issue is whether the publication can be reasonably understood as referring to the plaintiff. (*Blatty* v. *New York*

Times Co., supra, 42 Cal.3d at 1046; *Kelly* v. *Johnson Publishing Co.* (1958) 160 Cal.App.2d 718, 721-726 [325 P.2d 659]; *Saucer* v. *Giroux* (1921) 54 Cal.App. 732, 733-734 [202 P. 887]).

Based on the fact that the article could not reasonably be understood as referring to Ahmad, the trial court was correct in granting Globe's motion for nonsuit with respect to Ahmad. The article alleges that a young man who called himself Ali Ahmand was in fact the assassin. This statement suggests that the name used by the assassin was an alias or fictitious name. Furthermore, since the true name of the assassin is not claimed to be known in the article, the only clear identification of the alleged assassin stems from the photograph. The photograph is not of Ahmad. In addition, there is no evidence to suggest that upon reading the article and seeing Khawar's picture therein, any reader could reasonably have believed that the article concerned Ahmad merely because that reader knew that Ahmad is Khawar's father.

Other facts which lend credence to the conclusion that the article is not of and concerning Ahmad center around Ahmad himself. The article states that the assassin was a young man. Ahmad was fifty-two years old in 1968 and will be eighty years old in 1996. Clearly, such a person would not be characterized as "young" as of 1968. The article alleges that the assassin is an Iranian, whereas Ahmad is Pakistani. Finally, the name used in the Globe article is Ali Ahmand, whereas plaintiff Ahmad has a different spelling of his name; while this fact is not dispositive, it is one more impediment to Ahmad establishing that the article can reasonably be understood as referring to him.

In sum, because as a matter of law the article is not of and concerning Ahmad, the trial court properly nonsuited Ahmad.

DISPOSITION

The judgment is affirmed. Khawar shall recover his costs on appeal from Globe. Globe shall recover its costs on appeal from Ahmad.

GOLD (ARNOLD H.), J*

We concur:

LILLIE, P.J.

WOODS, J.

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* Assigned by the Chairperson of the Judicial Council.